(3)

No. 05-1435

FILED
SEP 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,
Petitioner,
v.

JETT J. MASON, JR.,
Respondent.

On Petition For Writ of Certiorari to the
Court of Appeals of Texas, Fifth District

PETITIONER'S REPLY BRIEF

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
For Criminal Justice

GENA BUNN
Chief, Postconviction
Litigation Division

* EDWARD L. MARSHALL
Deputy Chief, Postconviction
Litigation Division

FORREST LUMPKIN
Assistant Attorney General

ABIGAIL RUSHING
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400

* Counsel of Record

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION 1

I. *Davis v. Washington* 1

II. The Statements in the Present Case Were Not Testimonial Under *Davis.* 3

III. This Court Should Grant the Petition, Address the Significant Issue in this Case, and Determine that Henderson's Statements Were Not Testimonial. 8

IV. Alternatively, This Court Should Grant the Petition, Vacate the State Court's Judgment, and Remand the Case to the State Court for Consideration in Light of *Davis.* 10

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Anderson v. Alaska, 126 S. Ct. 2983 (2006) 10

Billingslea v. United States, 126 S. Ct. 2980 (2006) 10

Castellanos California, 126 S. Ct. 2965 (2006) 10

Crawford v. Washington, 541 U.S. 26 (2004) 2,3, 5, 10

Davis v. Washington, 126 S. Ct. 2266 (2006) ..... *passim*

Dewey v. Des Moines, 173 U.S. 193 (1899) 4

Forrest v. North Carolina, 126 S. Ct. 2977 (2006) 10

Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty., 542 U.S. 177 (2004) 2

Illinois v. Gates, 462 U.S. 213 (1983) 4

Lewis v. North Carolina, 126 S. Ct. 2983 (2006) 10

Thomas v. California, 126 S. Ct. 2983 (2006) 10

Warsame v. Minnesota, 126 S. Ct. 2983 (2006) 10

Wright v. Minnesota, 126 S. Ct. 2979 (2006) 10

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

After Petitioner, the State of Texas, filed the petition for writ of certiorari in this case, this Court issued its opinion in *Davis v. Washington*, 126 S. Ct. 2266 (2006), concerning whether statements made at a crime scene and during a 911 call were testimonial.

I. *Davis v. Washington.*

This Court recently addressed whether statements in a 911 call and statements to a police officer responding to a report of domestic violence were testimonial, such that their admission into evidence violated the Confrontation Clause. *Davis v. Washington*, 126 S. Ct. 2266 (2006).

This Court held, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 2273. "They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 2273-74.

However, this Court did not attempt to produce an exhaustive classification of all conceivable statements in response to police interrogation as either testimonial or nontestimonial. *Id.* at 2273.

This Court explained that in domestic violence situations, "[o]fficers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Id.* at 2279 (citing *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 186 (2004). A 911 call and the related initial

interrogation "is ordinally not designed primarily to 'estabis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance. *Id.* at 2276. A statement about an emergency is not a substitute for trial testimony. *Id.* at 2277. "No 'witness' goes into court to proclaim an emergency and seek help." *Id.*

In the *Davis* case, this Court noted the following about the circumstances surrounding the interrogation and the statements. The victim was speaking about events as they were actually happening, rather than describing past events. *Id.* at 2276. In contrast, the interrogation in *Crawford v. Washington*, 541 U.S. 26 (2004), occurred hours after the events that were described. *Id.* Any reasonable listener would recognize that the victim was facing an ongoing emergency. *Id.* The victim's call was plainly a cry for help against a physical threat. *Id.* Viewed objectively, the nature of the questions and the statements were necessary to be able to resolve the emergency rather than simply to learn what had happened in the past. *Id.* The witness in *Crawford* was responding calmly to questions at the police station, while the victim in *Davis* gave frantic answers over the phone in an environment that was not tranquil or even safe. *Id.* at 2277. This Court concluded that the circumstances of the interrogation in *Davis* objectively indicated that its primary purpose was to enable police assistance to meet an ongoing emergency. *Id.* This Court recognized that statements of that type need not be made in 911 calls for them to be nontestimonial. *Id.* at 2279. This Court observed that officers who arrive on the scene of domestic disputes and who need information to assess the situation and ascertain danger, may make initial inquires that *often* produce nontestimonial statements. *Id.*

In contrast, in the *Hammon* case, which was consolidated with *Davis*, this Court noted there was no emergency in progress. *Id.* at 2278. The officer heard no arguments or crashing and saw no one throw or break anything. *Id.* At first, the witness told the

officer that things were fine and that there was no immediate threat to her. *Id.* When the officer questioned the witness the second time, he was not trying to determine what was happening, he was trying to determine what happened. *Id.* This Court held that, objectively viewed, the primary purpose of the interrogation was to investigate a possible crime. *Id.* In discussing the formality of the interrogation, this Court compared the setting with that in *Crawford* and stated that both witnesses' interrogations were conducted while being actively separated from the defendants; the statements were in response to police questioning and deliberately recounted past criminal events; and they both took place some time after the events described were over. *Id.* The statements in *Hammon* were "neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation." *Id.* at 2279.

II. The Statements in the Present Case Were Not Testimonial Under *Davis*.

Shortly after a 911 call was made, Sergeant Donald Blasingame arrived at a residence. 2 RR 10, 12, 14, 34-35. Sarah Henderson answered the door. She was extremely upset, crying, and mad. 2 RR 10, 35-36, 41-42. The area around Henderson's mouth and nose was reddening and swelling. 2 RR 10, 36. Blasingame asked Henderson why she called the police. 2 RR 13, 22, 23, 24, 26, 27, 50. Blasingame was merely trying to find out why he was there. 2 RR 22-23. Henderson told Blasingame that that when she told Jett Mason that his phone was ringing, Mason slapped her in the face, shoved her off the bed, slapped her some more, put his hand on her throat, and told her he was going to kill her. 2 RR 11, 36.

Henderson's statements were made while she was upset, cyring, and mad, similar to the frantic nature of the statements in *Davis*. *Davis*, 126 S. Ct. at 2277. Mason had threatened to kill Henderson, and he was still present when the police arrived. Thus,

there was imminent danger against a bona fide threat. *Davis*, 126 S. Ct. at 2276. The statements were necessary for Blasingame to resolve that danger by staying, locating Mason, and keeping him away from Henderson.[1]

Mason asserts the danger had passed by then, however, Mason does not account for the looming threat of death. This case underscores a difference between domestic violence cases and most other crimes, even crimes of violence. The alleged batterer lives with the alleged victim. When the police arrive to a domestic violence call, they should be aware that both parties are likely present and that there is a significant danger that violence is occurring or will resume. That is why the State of Texas argues in the petition for writ of certiorari that the nature of domestic violence makes these types of situations different from other crimes. The State of Texas is not arguing, as Mason suggests, for some domestic violence exception to the Confrontation Clause because these cases are difficult to prosecute, a matter that was rejected in *Davis*. The State of Texas is arguing that the nature of domestic violence cases is a factor to be taken into consideration

---

[1] Mason contends that the State of Texas did not raise an argument about a cry for help or about the dynamics of domestic violence in its brief in state court. This is incorrect. First, the State of Texas argued in its brief, *inter alia*, that courts have admitted statements made to responding officers when the statement was made primarily to seek safety or aid from police and also when the officer did not know the nature of the crime involved, the identity of the alleged assailant, or the medical concerns of the victim. State's Brief at 8. The State argued that Henderson was concerned only about her immediate safety. State's Brief at 12. Second, the argument by the State of Texas on the issue is properly before this Court. *See Illinois v. Gates*, 462 U.S. 213, 219-20 (1983) (holding that the Court has clear jurisdiction to consider a constitutional issue raised and contested at every level of the state court system); *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899) (holding that "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discusssed").

when making the objective determination of whether a statement is testimonial. The State of Texas has also pointed out that the sheer number of domestic violence cases in which the victim does not wish to participate makes the Confrontation Clause issue especially significant.

As the State of Texas argues in the certiorari petition, domestic violence victims frequently call the police for protection and for safety, rather than for the prosecution of the batterer. They need protection because the batterer is living in the same residence. Although Justice Thomas recognized in the dissenting opinion in *Davis* that the alleged batterer can constitute a continuing danger to the alleged victim, requiring further police presence or action, 126 S. Ct. at 2284, the majority opinion did not discuss that unique aspect of domestic violence cases. Of course, such a discussion was unnecessary under the facts of *Davis* and *Hammon*, because the police in *Davis* were not faced with that situation, and the police in *Hammon* already secured the scene before the witness first told the police what had happened.

Nevertheless, in the present case, there was a specific danger in the form of Mason's threatening to kill Henderson. Under Mason's theory, there was no danger unless Blasingame saw Mason actually trying to kill Henderson at that time. Mason also relies on the fact that Henderson's statements were in the past tense, as in *Hammon* and *Crawford*, rather than in the present tense, as in *Davis*. If there is no emergency unless officers see one actually occurring, or if a statement can be made for the purpose of emergency assistance only if it describes events in the present tense, that would undercut this Court's rationale for holding statements made to enable police to meet an ongoing emergency are nontestimonial. This Court recognized that officers responding at a scene often must make initial inquiries that produce notestimonial statements for their safety and to protect others from danger. *Davis*, 126 S. Ct. at 2279. Determining whether a statement made for

safety or emergency purposes is testimonial or non-testimonial, based on whether it is made in the present tense, would be making an arbitrary distinction that does not necessarily demonstrate objectively why the statement was made. Rather, the circumstances in which the statement was made must be examined.

Mason also contends that in addition to being upset and crying, Henderson was angry. Mason claims that a person does not become angry when facing danger. But, it is not at all inconceivable that a person who has been threatened with death would become angry.

Mason also argues that the statements were testimonial because Henderson gave a written account of what happened. Officer Cody Graham arrived shortly after Blasingame. 2 RR 41. Graham took Henderson's statement sometime after Blasingame talked to Henderson, because Blasingame testified that he was not there when Graham took the statement. 2 RR 41. There was no written statement introduced into evidence. The fact that a written statement was taken sometime after Henderson first talked to Blasingame does not diminish the oral statements' nature as a cry for help. It would be common for an officer at the scene to take a written statement from an alleged victim after the emergency, protective, safety-oriented actions were taken. That has nothing to do with the circumstances under which the initial statement was made.

Mason contends that the fact that Blasingame talked to Henderson and Mason separately shows the statements were testimonial. However, Henderson answered the door and immediately responded to Blasingame's initial question. After that, Blasingame located Mason and talked to him. This was not a situation in which the police separated the two and only then asked what was happening.

Mason asserts that he was found in the bedroom and appeared to have been asleep when Blasingame found him. Mason also notes that Henderson told Mason she was calling the police. Mason argues that these show that any emergency situation had ended and that Henderson was merely reporting a crime, rather than seeking help. It is not clear how Henderson's threatening to call the police in an effort to stop a beating makes the actual contact with the police responding to the scene a mere opportunity to report a crime rather than an opportunity to obtain protection from the domestic partner's having threatened to kill her. Also, even if Mason had been asleep when Blasingame found him, that does not make the situation not dangerous. Mason was asleep when he woke up, assaulted Henderson, and told her he would kill her. Mason argues that the fact that things were fine before the alleged assault shows that this was an occurrence of short duration. On the contrary, the unexpected flare up of violence by Mason demonstrates the volatile situation that was present. The only uncertainty was when Mason might wake up and act on his threat to kill Henderson. Mason's argument is akin to saying there is no emergency when someone is in the bedroom with a bomb and a fuse, because the lighter is in the kitchen. For Henderson, the question would be when Mason would wake up and explode.

This case is not like *Hammon*. There, the witness told the officer that nothing was amiss. *Davis*, 126 S. Ct. 2272. She did not tell the officer about what happened until an officer had already found her husband and had talked with him. *Id.* One officer stayed with the husband, and the other officer returned to the witness and again asked her what had occurred. *Id.* After the witness related the events to the officer, the officer had her fill out and sign an affidavit. *Id.* The witness's statements were not made to seek assistance in an emergency, nor were they a cry for help.

Here, an officer arrived at Henderson's home and saw an upset, crying, and mad Henderson, who had redness and swelling

beginning around her mouth and nose. He asked her why she called the police. She told the officer that Mason had slapped her several times, put his hand on her neck, and threatened to kill her. Blasingame then found Mason in the home. Henderson's statements, although not made on the phone and not made in present tense, nevertheless explained what the situation was, including that her boyfriend threatened to kill her. Objectively viewed, the initial interaction between Henderson and Blasingame was necessary to resolve the then present emergency and Henderson's statements were a call for help against Mason's threat to kill her. Under *Davis*, the statements were not testimonial.

III. This Court Should Grant the Petition, Address the Significant Issue in this Case, and Determine that Henderson's Statements Were Not Testimonial.

The State of Texas argued in its petition that if this Court determined that the statements in *Davis* and *Hammon* were nontestimonial, this Court should grant the petition, vacate the state court's judgment, and remand the case to that court. The State of Texas argued that if this Court determined that those statements were testimonial, this Court should grant the petition and address the issue in the present case, because there were factors supporting the nontestimonial nature of Henderson's statements that were not present in those cases — Mason's threat to kill Henderson being the most significant one. However, this Court determined that the statements in *Davis* were nontestimonial while the statements in *Hammon* were testimonial.

Davis involved statements made in a 911 call apparently relating an assault as it was happening. Among the facts this Court found significant were that the statements were made in the present tense and the caller was alone with the assailant.

Hammon involved statements made at the scene to responding officers. The witness did not tell the police what was

happening until the police had already secured the scene.

Here, as soon as the officer arrived, Henderson related the events to him, explaining that her boyfriend slapped her several times, put his hand on her neck, and threatened to kill her.

Each of these cases involves scenarios that occur in domestic violence cases. In *Davis*, the statements were made in a 911 call during an assault. In *Hammon*, the statements were made to a responding officer after the assault and after the police had already secured the scene. Here, the statements were made to a responding officer shortly after the witness had been assaulted and after the alleged batterer threatened to kill her, but before the police secured the scene.

This Court has resolved an issue that is likely to recur in two common scenarios, but it has not resolved the issue as it arises in the present case. The State of Texas suggests that the situation in the present case is at least as common, and perhaps more common, than the ones in *Davis* and *Hammon*, particularly in domestic violence cases. Of course, the resolution of the issues in these three cases would be applicable to emergency, cry-for-help situations in cases that do not involve domestic violence. However, because of the prevalence of the unavailability of victims as witnesses in domestic violence trials, as pointed out in the petition, these issues arise with alarmingly greater frequency in domestic violence cases. The uniqueness of domestic violence cases makes it a common situation for the responding officer to find both the victim and the batterer to still be at the scene.

The State of Texas suggests that had this case come to this Court at the same time as *Davis* and *Hammon*, it would have made an excellent companion case for this Court to lay the framework for Confrontation Clause jurisprudence in this area. Consequently, the State of Texas urges this Court to grant the petition and address the significant Confrontation Clause issue in this case to provide more

comprehensive guidance for this unfortunately reccurring problem.

IV. Alternatively, This Court Should Grant the Petition, Vacate the State Court's Judgment, and Remand the Case to the State Court for Consideration in Light of *Davis*.

In the event this Court decides not to grant the petition to address the merits of the Confrontation Clause issue presented in this common, recurring scenario, the State of Texas asks this Court to grant the petition, vacate the state court's judgment, and remand the case to that court. *See Billingslea v. United States*, 126 S. Ct. 2980 (2006); *Anderson v. Alaska*, 126 S. Ct. 2983 (2006); *Thomas v. California*, 126 S. Ct. 2983 (2006); *Wright v. Minnesota*, 126 S. Ct. 2979 (2006); *Warsame v. Minnesota*, 126 S. Ct. 2983 (2006); *Forrest v. North Carolina*, 126 S. Ct. 2977 (2006); *Lewis v. North Carolina*, 126 S. Ct. 2983 (2006); *Castellanos California*, 126 S. Ct. 2965 (2006).

The state court considered the particular facts of the situation, such as the excited nature of the statements and whether the statements were made out of concern for safety (PA 4), to be subjective and not objective and thus not proper for the test set out in *Crawford*. PA 4, 8-9. As argued in the petition, the state court considered only the words and not the circumstances. That court did not have the benefit of this Court's opinion in *Davis*, in which this Court determined that statements made in circumstances which, viewed objectively, show the statements were made for safety concerns in emergency situations, are nontestimonial.

CONCLUSION

For the foregoing reasons, this Court should grant the State's petition for writ of certiorari.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
For Criminal Justice

GENA BUNN
Chief, Postconviction
Litigation Division

*EDWARD L. MARSHALL
Deputy Chief, Postconviction
Litigation Division

FORREST LUMPKIN
Assistant Attorney General

ABIGAIL RUSHING
Assistant Attorney General

*Counsel of Record

P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
Tel: (512) 936-1400
Fax: (512) 320-8132
Email: elm@oag.state.tx.us

ATTORNEYS FOR PETITIONER